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Office - Supreme Court, U. S.
FILED
JUN 23 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

314-640

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX TO PETITION

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit	1
Opinion	2
Basis of Jurisdiction	2
Basic Questions Involved	2
Statement of Facts	3
Reasons for Granting This Petition	7

CODES

Judicial Code, Section 240 (a)	2
Ohio General Code, Section 6828-16	3
Ohio General Code, Sections 6828 to 6828-79	3
Ohio General Code, Section 8324	4
Ohio General Code, Section 8325	4

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Sixth Circuit, entered after a denial of rehearing on April 12, 1941, reversing the judgment and decree of the District Court of the United States for the Southern District of Ohio, Western Division.

OPINION.

The opinion of the trial court appears in the record, page 54. The opinion of the circuit court of appeals is published in Federal Reporter 118 (2d), at page 604 (also R. p. 78).

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed on March 14, 1941. A petition for rehearing was filed on March 28, 1941. An order denying the petition for rehearing was filed on April 12, 1941. Order amending order for mandate and entering judgment was filed on April 17, 1941.

BASIC QUESTIONS INVOLVED.

The basic questions involved in this case are:

A. When a surety contract contains provisions designated "conditions," and the state law at the time of the formation of the surety contract prevents such provisions from operating as conditions, shall such provisions be interpreted as contractual promises against the admitted violator thereof?

B. Will a public corporation, in the absence of a restrictive statute, contractually bind itself to the surety on a construction contract, both by providing in the construction contract that the terms of the bond shall be a part of said construction contract, and by accepting a bond which likewise provides that the terms of the construction contract shall be a part of said bond?

C. Is a public corporation, in the absence of a restrictive statute, which lawfully assumes a position of obligee on a construction contract bond, sub-

ject to the normal *quasi* contractual obligations growing out of the relationship of surety and obligee?

D. When by statute a creditor of a bonded contractor may either procure a lien against the funds retained by the owner, or sue the contractor's surety, and such creditor elects to sue the surety, is the surety who pays such claim entitled to subrogation against the obligee-owner who wrongfully pays the contractor?

The district court decided these questions in the affirmative; the court of appeals in the negative.

STATEMENT OF FACTS.

The Miami Conservancy District is a public corporation created for the purpose of controlling the surface drainage of the Great Miami River Valley in Ohio. Sections 6828 to 6828-79 of the Ohio General Code control its creation and operation. The portions of said sections pertinent to this litigation are as follows:

Section 6828-6. "The district shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued; to incur debts, liabilities and obligations; to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds and to do and perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested."

Section 6828-74. "This act * * * shall be liberally construed."

On April 14, 1932, the district entered into a contract with the Ward-Hayes Construction Company to dredge a section of the Miami River for a consideration of 31 cents per cubic yard. Pursuant to Section 6828-16 of the Ohio

General Code, the District required said contractor to furnish a bond, upon which the petitioner became surety in the amount of $124,000. Said bond provided (R. p. 42) that the work contract, plans, and specifications were made a part of said bond (line 23, Exhibit B).

The bond also provided, in its so-called "condition," that the obligee should make all retentions "which said contract specifies the obligee *shall* or *may* retain * * * (but not less in any event than 10%) * * * until the time within which liens or notices of liens may be filed" (fourth condition, Exhibit B).

Section 8324 of the Ohio General Code, pertaining to liens on public contracts, provides:

> "Any subcontractor, materialman, laborer, or mechanic who has performed labor or furnished material, fuel, or machinery * * * for the construction, improvement, or repairs of any turnpike, road improvement, sewer, street, or other public improvement * * * *at any time not to exceed four months* from the performance of the labor, or the delivery of the machinery, fuel or material, may file with the owner, board, or officer * * * a sworn and itemized statement of the amount and value of such labor * * * material, fuel, or machinery."

Section 8325, Ohio General Code, provides that following such notice a lien shall exist against all unpaid balances.

The work contract likewise provided that the terms of the bond should be a part of said contract (R. p. 27); and that the contractor "at his own sole cost and expense should perform all labor and furnish all necessary materials" (R. p. 25).

The retentions which the contract stipulates the district *shall* make from the monthly progress payments (R. p. 34. Par. 17) are:

1. The value of all excavations more than six inches below grade, or beyond the limits (R. p. 41).

2. Twenty per cent of the value of the work done until final payment (R. p. 34).

The retentions which the contract provides the district *may* make are:

1. Such amount as may be necessary to meet unpaid labor or material bills "until satisfactory evidence be furnished that all liabilities have been fully discharged" (R. p. 33).

2. The final payment for thirty days after acceptance of the job (R. p. 35).

By the admitted facts, the district retained only a portion of those amounts which the contract expressly said it *should* retain, and no part of the amounts which the contract said it *might* retain. Neither did the district retain 10% of the value of the work until the lapse of the four-month statutory period allowed for filing lien notices. No effort was made by the district to procure evidence of the payment of labor and material bills other than to get such a statement from the Ward-Hayes Construction Company itself.

All actual excavation was completed by January 11, 1933 (R. p. 17), at the date of the eighth payment, yet no deductions whatsoever for overdepth excavation had yet been made. This entire deduction for 26,858 yards, amounting to $8,325.98, was all taken from the tenth payment. If this amount had been deducted, as the contract required during the course of the excavation, the seventh payment would have been reduced by $1,313.87, and the eighth payment of $7,612.11 could not have been made at all. There being no excavation whatsoever between the eighth and ninth estimate payments, the ninth payment of $7,500 also violated the contract. By these errors the contractor was overpaid during the running of the contract $15,825.98; the amount of the final payment

was $7,500 too small; and four out of the ten disbursements violated the contract (R. p. 18).

The work was approved on March 23, 1933, and the final payment made two days later (R. p. 19). This check was diverted by the contractor's banker, to its own claim, leaving unpaid labor and material bills in the amount of $11,750.75. The claimants made no effort to procure a lien against funds in the hands of the district, but proceeded directly against the surety. On July 28, 1933, the surety notified the district of these claims (R. p. 20).

Judgment was subsequently rendered in favor of the claimants against the surety in the Ohio Court of Appeals, which decision is reported in 5 Ohio Opinions, page 81. The surety promptly demanded reimbursement from the district, which payment was refused, and suit was brought against the district in the Federal District Court for the Southern District of Ohio. The first cause of action in the amended petition is at law for damages for failure to make the retentions as required by the work contract *and* the bond as mutually incorporated in each other. The second cause of action is in equity, based upon the violation by the district of its *quasi* contractual obligations as an obligee to its surety in that it failed to make the retentions provided solely in the work contract to the injury of the surety.

The district court below gave plaintiff judgment on both causes of action. The circuit court below reversed this judgment. These divergent conclusions, involving all of the basic questions above, resulted from the circuit court's refusal to give any effect to the "conditions" in the bond; its complete ignoring of the fact that the bond was incorporated in and by the work contract; and its giving no consideration whatsoever to any violation of the work contract by the district obligee as affecting the rights of the surety; because, as stated in its decision:

> "The contract was between the district and the construction company and not between the district

> and the surety. * * * It is doubtful that a public body whose contractual powers are limited, may be made liable as to (d) private parties in relations *quasi ex contractu.*"

We submit that the district court followed recognized precedents in the law of suretyship. The circuit court bblazed a wholly new trail!

REASONS FOR GRANTING THIS PETITION.

1. The decision of the circuit court of appeals herein is in conflict with the decisions of other circuits.

2. The questions involved herein are most important to every unit of local government in the United States, and to every bonding company signing public construction bonds. These questions have not been, but should be, settled by this court.

3. The circuit court of appeals decided this case contrary to its own precedents but in attempted conformity to an Ohio Court of Appeals decision which was rendered after the rights of the parties herein had fully accrued, and which did not correctly state Ohio law.

A brief presenting petitioner's arguments is hereto attached.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

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INDEX TO BRIEF

Petitioner's Brief 9

Conclusion 21

Table of Cases

Bruner Agency Company vs. Smith, 25 Ohio App. 21, at 29 11

Cincinnati G. L. and C. Co. vs. Avondale, 40 O. S. 257 14

Cincinnati vs. Cameron, 33 O. S. 336 14

Clayborne Parish School Board vs. Fidelity & Deposit Co., 40 F. 2d 577 (Fifth Circuit) 9, 16

Clayborne School Board vs. Fidelity & Guaranty Co., 40 F. 2d 577 16

Commissioners vs. Ziegelhofer, 38 O. S. 253 14

Dumphrey vs. Ryan, 116 U. S. 491 13

Erie R. R. vs. Tompkins, 58 S. Ct. 817 19

Ft. Worth Independent School District vs. Aetna Casualty and S. Co., (Fifth Circuit) 48 F. 2d 1 9

Globe Indemnity Company vs. Unity Railways Co., (Third Circuit) 272 Fed. 607 9

Great Southern Fire Proof Hotel Co. vs. Jones, 193 U. S. 532 19

Greene County, Kentucky, vs. Quinlan, 211 U. S. 583, 584 11

Hart vs. Pierce, 125 So. 243, 98 Fla. 1087 11

Hochevar vs. Maryland Casualty Company, 114 F. 2d 943 ..... 14, 15

Jordan vs. Busch, 1 N. E. 2d 745, 285 Ill. App. 217 11

Medical Arts Building Co. vs. Minnesota Loan & Trust Co., 78 F. 2d 937 20

National Surety Co. vs. County Board of Education, 15 F. 2d 993 (Fourth Circuit) 9

New Amsterdam Casualty Co. vs. A. Wirtz, 5 Ohio Opinions 80 10

Royal Indemnity Co. vs. Northern Ohio Granite Company, 100 O. S. 373 10

State ex rel. Nixon vs. Merrell, 126 O. S. 239 17
State vs. Schlesinger, 114 O. S. 323 15
U. S. Fidelity & Guaranty Co. vs. City of Montesano, 295 Pac. 935, 160 Wash. 565 16
Village of Beechwood vs. Ohio Casualty Company, 47 Ohio App. 212 13
Walley vs. Mears Heel Company, 4 Fed. Supp. 277 11
Weakley vs. Firebaugh, 269 Ill. App. 123 11
West vs. American Telephone and Telegraph Company, 61 Sup. Ct. Rep. 179 19
Woodruff vs. Woodruff, 44 N. J. Eq. 349, 1 L. R. A. 380 10

CODE

Ohio General Code, Section 6828-6 14

PETITIONER'S BRIEF.

In this brief we shall discuss the "Reasons for Granting This Petition" in the order as given in the petition.

I.

As to the decisions of other circuits, see *Globe Indemnity Company* v. *Unity Railways Co.*, (Third Circuit) 272 Fed. 607, where the court says on page 609:

> "The surety on a contractor's bond has an equity in the reserved percentages, and has a right to expect and demand that no payments will be made contrary to the terms of the contract."

also *Ft. Worth Independent School District* v. *Aetna Casualty and S. Co.*, (Fifth Circuit) 48 F. 2d 1:

> Sections (2 and 3) on page 3 of the above decision disclose a remarkable similarity to the facts and contentions of defendant's counsel therein to the case at bar.

At page 4, Sections (4, 5) the court says:

> "A stipulation in a building contract that a percentage of the price would be retained until the final completion of the contract, is as much for the benefit of the surety as for the protection of the owner * * *."

and on page 5:

> "We can see no justification on the part of the school board in disregarding the provisions for retaining a percentage of the price * * *. It was called upon to respect the rights of the surety, and not to do anything which was reasonably calculated to increase its obligation or risk under the bond."

See, also:

National Surety Co. v. *County Board of Education*, 15 F. 2d 993 (Fourth Circuit).

Clayborne Parish School Board v. *Fidelity & Deposit Co.*, 40 F. 2d 577 (Fifth Circuit).

II.

The questions enumerated in the petition under "Basic Questions Involved," are most important, and should be settled by this court.

A.

The bond herein was a common form used throughout the United States. It stipulated that the things to be done by the obligee to prevent loss should be "conditions," the violation of which would excuse the surety from all liability under the bond. However, the Supreme Court of Ohio, in 1919, in *Royal Indemnity Co.* v. *Northern Ohio Granite Company*, 100 O. S. 373, held that where the construction contract provided that the contractor should pay all labor and material bills (as in the case at bar), the bonding company could not escape liability, regardless of any other bond conditions.

The Ohio Court of Appeals interpreted the bond at bar in *New Amsterdam Casualty Co.* v. *A. Wirtz*, 5 Ohio Opinions 80, in the same manner as the *Royal Indemnity Company Case, supra*, in spite of the admitted violation of the so-styled "conditions" in the bond.

Many states now have statutory laws and precedents controlling labor and material claims, similar to Ohio, and the determination of the effective force of such "conditions" is of very broad and general interest. If surety companies intending to sign surety bonds are to be liable as insurers, and if obligees may violate with impunity bond provisions which are called "conditions" but cannot so operate, such legal interpretations should come from no lower tribunal than the Supreme Court of the United States.

In *Woodruff* v. *Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, land was deeded "upon the following conditions," but later provisions in the deed prevented the grantor from treating these terms as conditions, just as in the case at bar provisions in the work contract, which was made a

part of the bond, and which also incorporated the bond within itself, made it impossible to treat these bond "conditions" as real conditions. The court says:

> "While the words 'provided nevertheless' and 'upon the following conditions' are appropriate to create a condition * * * they and similar words will give way when the intention of the grantor, as manifested by the whole deed, is otherwise."

In *Bruner Agency Company* v. *Smith*, 25 Ohio App. 21, at p. 29, the court says:

> "Courts will not ordinarily construe stipulations in a contract as conditions precedent unless it plainly appears that such was the intention of the parties."

See *Greene County, Kentucky,* v. *Quinlan*, 211 U. S. 583, on page 594:

> "It is not conclusive that the obligation thus imposed upon the railroad is called a condition. It frequently has been the case that the word 'condition' has been used in written instruments in a looser and broader sense than the law attaches to it. * * * When such an intent is discovered, the court has no difficulty in giving it effect."

The courts have consistently frowned upon contracting parties who violate contractual provisions designated as "conditions," and then set up such violation as a defense.

Weakley v. *Firebaugh*, 269 Ill. App. 123.
Hart v. *Pierce*, 125 So. 243, 98 Fla. 1087.
Jordan v. *Busch*, 1 N. E. 2d 745, 285 Ill. App. 217.
Walley v. *Mears Heel Company*, 4 Fed. Supp. 277.

If these provisions in the bond at bar are not real conditions, they are either promises or little more than a nullity. The obligee most obviously did not desire them to be a nullity, as it had them amended by inserting "two weeks" in place of "thirty days," to get quicker service from the surety in the event of the contractor's default. The obligee substantially observed these conditions until

the excavation was completed (when all danger of requiring the surety to complete the contract was over). Whereupon the obligee began to act in such reckless violation of the conditions of the bond as almost to show a desire to cause loss to the surety.

B.

The circuit court below not only disagreed with the trial judge, who interpreted these "conditions" as promises, but also refused to recognize that there was any contractual obligation at all between the district and the bonding company. The court says (p. 606): "The contract was between the district and the construction company, not between the district and the surety."

In arriving at this conclusion the court below, while recognizing that the contract was incorporated in the bond, completely ignored an outstanding controlling fact referred to by the trial judge (R. bottom p. 59), that the district had *expressly incorporated the bond in the work contract.*

With these two elements welding the work contract and the bond into one instrument, is it rational to contend that the contract is only "between the district and the construction company"? Is there any judicial theory by which an obligee can incorporate the bond in the principal contract to advance his own interest and then reject the bond from the contract to escape liability?

In this tripartite agreement between the district, the contractor, and the surety, there is every element of a contract. The statute required the district to procure a bond. With this knowledge the district prepared the contract for the contractor, and provided in the contract that whatever bond was obtained, its provisions should become a part of the work contract. Thereupon the contractor profered the bond in which it was also provided that the work contract should be a part of the bond. Whereupon this bond, profered as aforesaid, was accepted by the district, marked "approved," and the contractor au-

thorized to proceed with the contract. Here we have plainly an offer by the district to any bonding company, agreeable to the contractor, which was accepted by the petitioner, and the acceptance formally ratified by the district.

In this tripartite agreement between each two of the three contracting parties there was an offer, an acceptance, and a consideration—the basis of every contract.

C.

Should it be determined, however, that this two-way binding of the contract and the bond does not constitute a contract between the obligee and the surety, there still remains plaintiff's second cause of action based upon the normal *quasi* contractual obligation of an obligee to a surety, growing out of the legal requirement that the obligee must not violate its contract with the principal to the injury of the surety. The court below (bottom p. 606) says: "It is doubtful that a public body whose contractual powers are limited, may be made liable as to (do) private parties in relations *quasi ex contractu.*"

This startling doubt is very obviously based upon the decision of the Ohio Circuit Court in the *Village of Beechwood* v. *Ohio Casualty Company*, 47 Ohio App. 212, which holds that those public corporations which operate under limited statutory contractual powers cannot be held liable "in relations *quasi ex contractu.*"

Exhaustive research of all counsel in this case has found no other decision in the United States or England to support this principle. The court in the Beechwood case relied upon five Ohio decisions involving actions against public corporations on *implied* contracts, after an attempted express contract had been declared in violation of law. It is elemental law that an implied contract cannot be created as a substitute for an illegal express contract.

Dumphrey v. *Ryan*, 116 U. S. 491.

None of the authorities in the Beechwood case pertaining to *implied* contracts had the remotest bearing on *quasi contractual obligations.* The Supreme Court of Ohio has always recognized the full contractual powers and liabilities of all public corporations in the absence of restrictive statutes. See:

Cincinnati v. *Cameron,* 33 O. S. 336.
Cincinnati G. L. and C. Co. v. *Avondale,* 40 O. S. 257.
Commissioners v. *Ziegelhofer,* 38 O. S. 253 (see third paragraph on p. 529.)

Consequently, the Village of Beechwood case on the question of the *quasi* contractual liability of public corporations in Ohio is not a decision of the highest state court. This decision, furthermore, confines itself to public corporations of *limited* statutory powers. The conservancy district is not such a corporation. Please note the broad plenary powers set forth in Section 6828-6, Ohio General Code, *supra,* p. 3.

The attorney general of Ohio (O. A. G., 1933, p. 700) in interpreting these broad powers says:

> "The general rule of law * * * is that a grant of power to a public officer or board must be strictly construed.
>
> In the case of the conservancy act, however * * * the powers of the conservancy district * * * are not to be limited to those expressly granted, but are to include also the powers to perform all acts necessary and proper for the carrying out of the purposes for which the district was created.
>
> The directors are at liberty to do anything which is not out of harmony with any express limits on their action."

The Beechwood case was really rejected as an authority by the Sixth Federal Circuit Court itself, on October 15, 1940, in *Hochevar* v. *Maryland Casualty Com-*

pany, 114 F. 2d 943, where the court attempts to distinguish the Hochevar case from the Beechwood case with the statement that "the village was not obligated by the contract, as was the county here, to retain the percentages until materialmen and laborers are paid." Nevertheless, the court did hold in the Hochevar case that the county violated its contract with the principal contractor, and that the county *was* liable on a *quasi* contractual obligation. This is directly in conflict with the Beechwood case, and in peculiar disharmony with its "doubt," expressed herein below.

D.

The court below held that since the creditors of the contractor failed to attempt to procure a lien against funds in the hands of the district, the surety who paid these claims after suit is barred from his rights as subrogee, the theory being that the rights of the subrogee can rise no higher than the rights of the subrogor. This reasoning seems to result from a confusion between the subrogor's substantive right to be paid from funds in the hands of the district, and his remedy to protect that right. While it is, of course, true that a subrogee can have no rights of payment against a principal debtor, which the original creditor did not have, we submit there is nothing in the law which holds that the subrogee's *remedies* may not be different, either higher or lower, than those of the original creditor.

We have found no support for the Beechwood case precedent in the law of subrogation. The Supreme Court of Ohio has always recognized the subrogee's right to recover from the obligee who has acted to the injury of the principal's surety, regardless of the failure of the claimant to procure a lien against funds in the hands of the obligee. See *State* v. *Schlesinger*, 114 O. S. 323. In the *Hochevar Case, supra*, the Sixth Federal Circuit Court itself, in commenting upon the Beechwood case, says:

> "No importance should here be attached to the statement therein, that the rights of the surety can rise no higher than those of materialmen or laborers."

The facts in the Hochevar case differed somewhat from those in the Beechwood case, but one cold common fact in each case was that the claimants in both cases did *not* procure a lien against the debtor. If the subrogee's remedies were to be limited by those of the creditor in the Beechwood case, they certainly should have been in the Hochevar case if the Beechwood case were a precedent.

In addition to the subrogation law in the Beechwood case repudiating the accepted law of the Ohio Supreme Court, it was also *obiter dicta*. The Beechwood case primarily determined:

1. That there was no contract, express or implied, between the surety and the obligee, and

2. That the village could not be held liable under any *quasi* contractual obligation.

If the surety had no rights under either an express, implied, or *quasi* contract, he was completely shut out as a subrogee in any event, and any statement which the court made as to what his rights might be if he were a subrogee is obviously *obiter dicta*. That this *obiter dicta* of the Beechwood case, which was unfortunately followed by the circuit court of appeals below, is contrary to the overwhelming weight of authority, see:

> *Clayborne School Board* v. *Fidelity & Guaranty Co.*, 40 F. 2d 577.
>
> *U. S. Fidelity & Guaranty Co.* v. *City of Montesano*, 295 Pac. 935, 160 Wash. 565.

The court below expressed some doubt also as to the effectiveness of Sections 8324 and 8325 of the Ohio General Code, *supra*, to create a lien. It bases its doubt on *In re Schilling*, 251 Fed. 966. This reasoning is not ob-

vious. On the other hand, the Supreme Court of Ohio has always given full force and effect to these lien sections. See *State ex rel. Nixon* v. *Merrell,* 126 O. S. 239:

> "Under this statute (8324-5) a materialman or laborer, by following the procedure provided, may acquire a lien against funds appropriated by the state for the construction for which the material or labor was furnished."

Of course, it is obvious that after the district paid out the money due on the contract, the claimants could have no lien because there was nothing on which to attach a lien, but the "conditions" in the bond required the district to retain the money until the time for *lien notices* had passed. This was four months after the completion of the work. The district actually retained final payment for two days! (R. p. 51.)

III.

A comparison of the decision of the court below in the Hochevar case with the decision of the court below in the case at bar, is very persuasive that the court below in deciding the case at bar did not use its independent judgment herein, but did give undue and controlling effect to a decision of the Ohio Court of Appeals which decision was rendered after the rights of the parties herein had fully accrued.

There are five factual distinctions between the Hochevar case and the case at bar, three of which give the plaintiff herein a stronger right of recovery than that possessed by the surety in the Hochevar case, and the remaining two justify no distinction in legal principles.

1. The Hochevar case contained no provisions in the bond expressly binding the obligee to certain conduct as did the "conditions" of the bond herein.

2. The Hochevar case contained no provision in the bond and the contract expressly binding both into a single instrument.

3. The Hochevar case pertained to a county government whose contractual powers are more limited than those of the conservancy district.

4. In the Hochevar case the construction contract required that the percentage retentions be held until releases were procured, or an affidavit given that labor and material claims had been paid. In the case at bar the construction contract merely provided that releases should be supplied "if requested," but that retentions would be held until final payment, and that no payments would be made for overdepth excavation.

5. In the Hochevar case the obligee had notice of unpaid labor and material claims at the time of settlement. In the case at bar the plaintiff presented no evidence of such notice.

Distinctions 1 and 2 above give the plaintiff its first cause of action at law, which the surety in the Hochevar case did not claim to have. It is this legal cause of action which the court below seemed to completely overlook. If plaintiff herein is entitled to his legal cause of action, then distinctions 3, 4, and 5 above would have no pertinence whatsoever to plaintiff's legal rights.

Distinction 3 would give to the district a broader contracting power and a greater liability on *quasi* contractual obligations than were those possessed by the county in the Hochevar case.

Distinction 4 is merely one between the character of the clauses in the work contract which each of the respective obligees violated. There is no distinction in the legal principles involved in their violation. In both cases the result was that the obligee paid the principal without the surety's knowledge large sums of money before they were due. In the Hochevar case it was $17,278.34. In the case at bar it was $15,938.09.

If the violations of the contract by the district had been less flagrant, or of a nature only questionably damaging, the presence or absence of notice of outstanding claims might have had relevance; but in the case at bar, the violations were so pronounced and their natural consequences so obviously injurious to the surety, that the absence of knowledge of outstanding claims by the district at the time of payment could have no probative value.

The Hochevar case expressly repudiated the law of the Village of Beechwood case. Yet, the same court which decided the Hochevar case, in passing later upon plaintiff's equitable cause of action below, embraced *in toto* all of the law set forth in the Village of Beechwood case, from which it quotes largely verbatim.

The explanation is obvious. Following the decision of the Hochevar case the United States Supreme Court reversed the Sixth Circuit Court for failing to follow the Ohio Court of Appeals in *West* v. *American Telephone and Telegraph Company,* 61 Sup. Ct. Rep. 179. The decision herein below was most apparently an effort to comply with the Supreme Court's instruction.

The obvious purpose and effect of *Erie R. R.* v. *Tompkins,* 58 S. Ct. 817, was to give to state court decisions in questions of general common law the same controlling influence over federal decisions as had formerly been exercised by state court decisions in interpreting state statutes and local law. It has long been held by federal courts that state decisions interpreting state statutes were not controlling over federal court decisions when the state decision was rendered after the accrual of the rights of the litigants. See *Great Southern Fire Proof Hotel Co.* v. *Jones,* 193 U. S. 532:

> "The federal court is bound to accept decisions of the state courts construing state statutes rendered prior to the making of the contract on which the cause of action is based. Such duty does not exist in re-

gard to decisions of the state court rendered after the cause of action has arisen, although before the action itself was commenced, when the federal court in the exercise of its independent judgment reaches a different conclusion from the state court."

The same reasoning applies to state decisions of local law. See *Medical Arts Building Co.* v. *Minnesota Loan & Trust Co.*, 78 F. 2d 937:

> "Where no local rule of property has been declared at the time the rights of the parties accrue the federal court must exercise its independent judgment in the matter."

The legal rights of the parties herein accrued on March 25, 1933, the date on which The Miami Conservancy District wrongfully paid the Ward-Hayes Construction Company without making any retention to cover the period in which lien notices could be filed. There was some additional litigation necessary between the claimants and the surety to determine the amount of the claims and to protect the surety from being a volunteer so that his subrogation rights would not be affected. However, the basic rights and liabilities between the parties to this litigation were fully set and determined on March 25, 1933. The decision of the Village of Beechwood case was not rendered until March 12, 1934.

Can anyone who notes the widespread conflict between the decision of the sixth circuit below, and other federal circuits; who reads the Hochevar case where many of these same conflicting federal circuit decisions are cited with approval, and where the Village of Beechwood case is expressly repudiated; and who then reads the decision below, which not only embraces the legal concepts of the Village of Beechwood case, but extensively quotes therefrom—can any such person say that the court below exercised its independent judgment?

Conclusion.

This litigation is full of many questions of very great interest to local governmental units engaged in construction contracts, and to sureties generally. There is no express precedent interpreting the "conditions" used in many construction bond forms. Until the decision herein below the law was well settled that public corporations were liable as obligees on construction bonds to the same extent as private parties. Since the decision herein that law is now in great confusion.

Furthermore, a litigant who appeals to the federal courts ought to be informed as to whether his rights are to be wholly determined by later state court decisions to which he was not a party, and from which he has no appeal.

Respectfully submitted,

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(19)

FILED
JUL 30
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

RESPONDENT'S BRIEF OPPOSING ISSUE OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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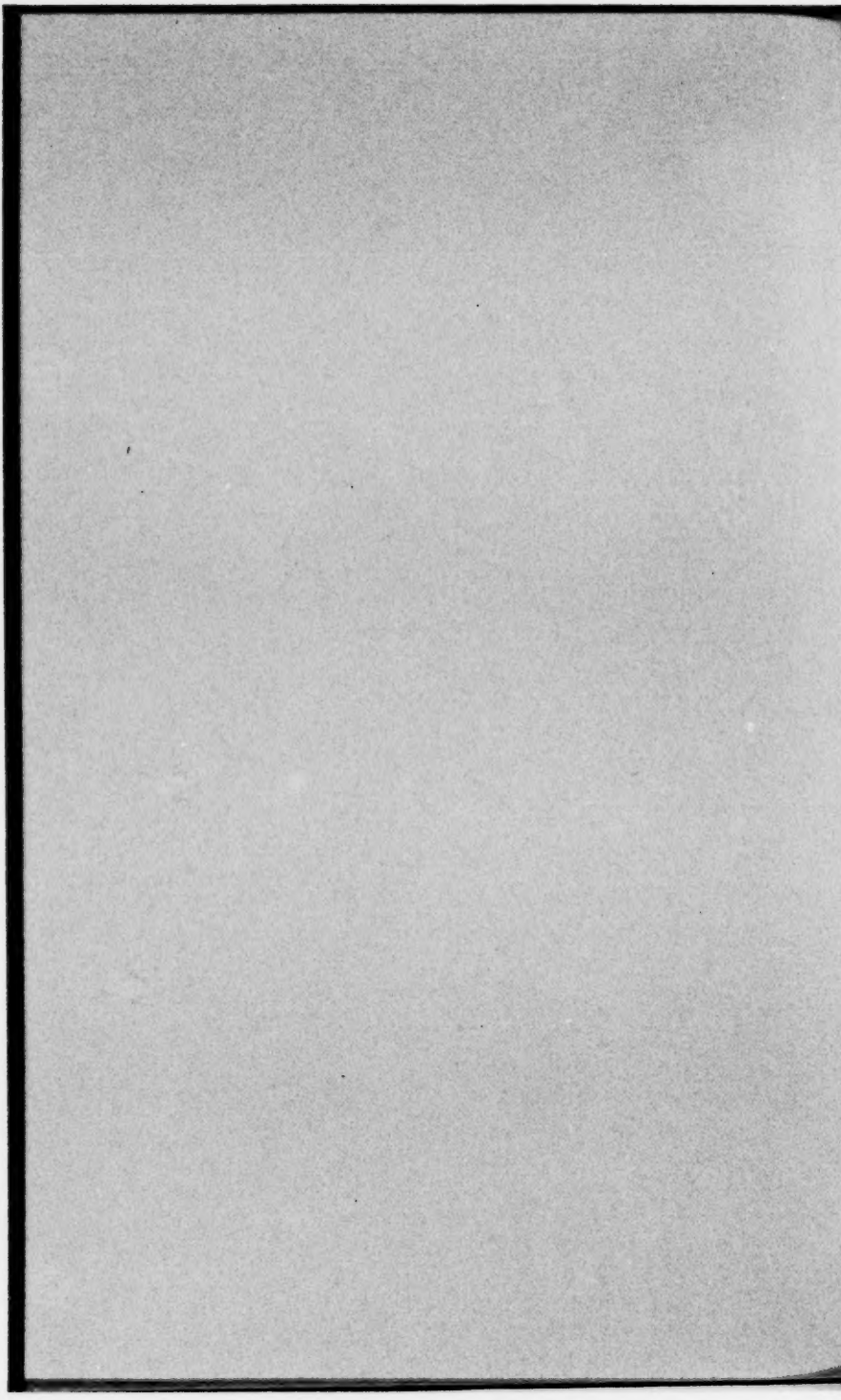

INDEX

I. Basis of Jurisdiction 1

II. Basic Questions Involved 2

III. Statement of Facts 4

A. Decisions of lower courts 10

IV. Reasons Given for Granting Petition Are Inapplicable (Reply to Petitioner's Brief) 13

A. There is no conflict between decision below and decisions of other circuits 13

B. Further consideration of this litigation is important only to the parties 14

C. The lower court has properly applied the law in all cases herein considered 19

V. Conclusion 20

Table of Cases

Blosser vs. Enderlein, 113 O. S. 121, 132 (1925) 3

Buchanan Bridge Company vs. Campbell et al., 60 O. S. 406 (1889) 18

Claiborne Parish School Board vs. Fidelity & Deposit Co., 40 F. 2d 577 (1930, C. C. A. 5) 14

Frisbie Co. vs. East Cleveland, 98 O. S. 266 (1918) 18

Ft. Worth Independent School District vs. Aetna C. & S. Co., 48 F. 2d 1 (1931, C. C. A. 5) 14

Globe Indemnity Co. vs. Unity Railways Co., 272 Fed. 667 (1921, C. C. A. 3) 13

Hale vs. Finch, 104 U. S. 261 (1881) 3

Hochevar vs. Maryland Casualty Company, 114 F. 2d 948 (1940, C. C. A. 6) 19

Hommel & Co. vs. Woodsfield, 115 O. S. 675 (1927) 18

Magnum Co. vs. Coty, 262 U. S. 159, 163 (1923) 2

Maryland vs. B. & O. Railway Company, 89 U. S. 105, 113, 22 Wall. 105 (1874) 3

McCloud vs. Columbus, 54 O. S 439 (1896) 18

Milske vs. Steiner Mantel Company, 103 Md. 235, 247 (1906) 15
Morgan vs. Boyer, 39 O. S. 324, 326 (1883) 3
National Surety Co. vs. County Board of Education, 15 F. 2d 993 (1926, C. C. A. 4) 14
New Amsterdam Casualty Co. vs. Wirtz Transfer Co., 5 Ohio Opns. 80, 20 O. L. Abs. 309 (1935) 3
Railroad Companies vs. Schutte, 103 U. S. 118, 140 (1880) 3
The Binghamton Bridge, 70 U. S. 51, 74, 3 Wall. 51 (1865) 3
Village of Beachwood vs. Ohio Casualty Co., 47 Ohio App. 212 (1934) 12, 18, 19, 20
Welston vs. Morgan, 65 O. S. 219 (1901) 18

STATUTES

General Code of Ohio, Section 6828-16 ..... 4, 9, 17
General Code of Ohio, Section 8324 ..... 12, 18
General Code of Ohio, Section 8325 18
Judicial Code, Section 240(a), amended by Act of February 13, 1925, C. 229 (43 Stat. 938, 28 U. S. C. A., Sec. 347) 1

COURT RULES

Court Rule 38, Section 5 21

TEXTBOOKS

Restatement of Law—Contracts, Section 230 3
III Williston on Contracts, Rev. Ed., Sec. 607, et seq. 3

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RESPONDENT'S BRIEF OPPOSING ISSUE OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

BASIS OF JURISDICTION.

Respondent agrees that if the prayer of the petition for writ of certiorari appeals to the discretion of this court, it has jurisdiction to issue the writ under Section 240(a), of the Judicial Code as amended, by the Act of February 13, 1925, C. 229 (43 Stat. 938, 28 U. S. C. A., Sec. 347).

II.

BASIC QUESTIONS INVOLVED.

As counsel understand this case, it is primarily and fundamentally one involving the construction of a contract. There is no debatable question of law involved. It is dependent upon the particular working of the documents and the circumstances involved in this specific transaction. It was so considered by the District Court (*infra*, page 10) and the Circuit Court of Appeals (*infra*, page 12). If the documents had the meaning which opponents seek to read into them, but which the Court below refused to follow, other issues are raised which they must answer. However, those issues are not primarily involved and their consideration is not necessary to the decision of the case presented by the record.

We submit that the petitioner is merely seeking a reconsideration of the general merits of its case, rather than the determination of any basic questions of law. This petition falls well within the eighty per cent desiring another hearing of their cases mentioned by Mr. Chief Justice Taft, in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first to secure uniformality of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

We cannot agree that the four basic questions as stated by petitioner on page 2 of the petition are involved in this case; are necessary to the determination of the issues raised by the pleadings or the facts; or were determined by the Circuit Court of Appeals. Question A seeks to raise the question of contract construction. We submit that as stated it is not based on the facts shown by this record. To construe this particular contract, it is necessary to consider its exact wording and the circumstances surrounding its creation.* It is not possible to phrase such a question adequately without stating the entire case. We propose to state the essential facts appearing in the record to demonstrate that the issue involved was clearly decided below and that there is no fundamental question of law justifying the consideration of this Court or any special or important reasons for the issue of this writ of certiorari.

Unless this Court rehears the merits of the case and construes the contract to mean the exact opposite of the construction placed upon it by the Circuit Court of Appeals, the record in this case raises no other issues. Consequently, we submit that petitioner's Questions B, C, and D are not involved, and we make no attempt to reframe them to relate to the secondary defenses interposed in the defense of this action.

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*Restatement of Law—Contracts, Section 230; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 140 (1880); *Maryland* v. *B. & O. Railway Company*, 89 U. S. 105, 113, 22 Wall. 105 (1874); *The Binghamton Bridge*, 70 U. S. 51, 74, 3 Wall. 51 (1865); *Morgan* v. *Boyer*, 39 O. S. 324, 326 (1883); *Blosser* v. *Enderlein*, 113 O. S. 121, 132 (1925); III Williston on Contracts, Rev. Ed., Sec. 607, *et seq.* See similar document in *Hale* v. *Finch*, 104 U. S. 261 (1881).

III.

STATEMENT OF FACTS.

We cannot agree that the statement of facts contained in the petition fairly sets forth a summary statement of all the essential matter involved. Largely in addition to the facts in the petition, we submit the following summary of the agreed statement of facts (R. 16), the statutory law of Ohio, and the decisions of the lower courts.

It should be noticed that this is *not* the usual situation in which the obligee of a bond seeks to recover from the surety for the loss covered by the bond. In this case the surety is attempting to frame an action by which it may recover from the named beneficiary of the bond for the payment which it made under its suretyship undertaking, despite the fact that such a recovery would throw upon the named obligee the very loss against which it sought to protect itself by requiring the bond.

The primary contract here involved is one between a political subdivision and public corporation of the State of Ohio, The Miami Conservancy District, and an excavating contractor for the removal of excess material from a river channel.

On April 14, 1932, this agreement was executed by the contractor, approved by the Board of Directors of the District, and executed in duplicate by the president of the Board (R. 16 and 27). This execution was in accordance with the terms of Section 6828-16 of the General Code of Ohio, which expressly provides the formalities by which work contracts of conservancy districts shall be created.

> Section 6828-16. To Advertise and Let Contracts. *When it is determined to let the work by con-*

> *tract*, contracts in amounts to exceed one thousand dollars shall be advertised after notice calling for bids shall have been published, once a week for five consecutive weeks completed on date of last publication, in at least one newspaper of general circulation within said district, where the work is to be done, *and the board may let said contract to the lowest or best bidder who shall give a good and approved bond, with ample security, conditioned on the carrying out of the contract.* But said contract shall not be let to another than the lowest bidder unless upon a hearing before the court and upon notice to all parties interested, an order be obtained therefor. *Such contract shall be in writing*, and shall be accompanied by or shall refer to plans and specifications for the work to be done, prepared by the chief engineer. *Said contract shall be approved by the board of directors and signed by the president of the board and by the contractor, and shall be executed in duplicate.* Provided, that in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the unanimous consent of the board of directors, with the approval of the court or judge in vacation.

(The part of this section important for present purposes has been italicized.)

By the express terms of the contract, the Conservancy District agreed to pay progress estimates during the prosecution of the work, but to withhold until final payment twenty per cent of the estimated value of the work done on the several dates of progress estimates (R. 34, 35, Secs. 17, 18). Section 18 (R. 35) provides that "*on or before the expiration of thirty days after* date of the acceptance of the work by the Board, the District shall pay to the contractor the amount due him on the final estimate."

Parenthetically, we mention Petitioner's discussion of certain "over depth deductions" (petition page 5). This claim is not included in the Second Amended Petition in

the District Court (R. 1) and was ignored by both lower opinions. The contention is contrary to the construction of the entire agreement and the practical construction of the parties. Since the final payment, March 25, 1933, was of larger amount than the total claimed by petitioner and was properly made, any possible incidental errors would cause no damage to it.

Following the statutory requirement, a provision of the agreement required the contractor to furnish a surety bond (R. 27). The petitioner was a professional paid surety who prepared and executed this bond on its own printed form (R. 21). A photostatic copy of this bond appears on pages 43 and 44 of the record. It defines the "Obligee" as the Miami Conservancy District (lines 7-11). The agreement provided that the bond and other documents should constitute integral parts of the agreement (R. 27). The bond provided that the contract was made a part thereof (R. 43). The bond is dated as of the same day as the contract. Obviously, however, by the necessities of the case as well as the express wording of the bond (R. 43, lines 15-20), that obligation was not executed and was not in existence until some time after the work contract was signed.

For the purposes of this case, the important provision of the bond is lines 27-29, reading:

> "Provided, however, that this Bond is executed upon the following express conditions, each of which shall be a condition precedent to any right of recovery hereon, anything in the contract to the contrary notwithstanding."

Then follow six provisos, each constituting a numbered paragraph. It is Petitioner's contention that in some way

the fourth proviso constituted a promissory obligation of the Conservancy District and altered and superseded the provisions for final payment in the work contract outlined above. The wording of that proviso is not important since we admit that, if it did constitute an *enforceable promise*, it required the retention by the District of a larger amount of money than that now claimed by the Surety beyond the time when final payment actually was made. The only other proviso of interest is the sixth, reading:

> "That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the Obligee herein named; * * *"

The Ohio courts, in a suit by subcontractors against the Surety Company, held that provision void as in conflict with the public policy of the State (See second paragraph following).

It is admitted that the work required by the contract was completed to the satisfaction of the District, and that final payment was made within thirty days after the acceptance of the work by the Board of Directors of the District (R. 18). This final payment was thus made strictly in accordance with the final payment provision of the contract as quoted above. This final payment was made in good faith without notice or knowledge of any outstanding claims against the contractor or the Surety (R. 19). The amount of the final payment was more than that claimed by the Surety Company in this action (R. 19 and R. 6).

Four months after final payment, the Surety first notified the District of outstanding claims against the contractor for labor and material (R. 20). The contractor

being insolvent, these claims were made against the Surety, which resisted payment. The ensuing suit was carried to the Supreme Court of Ohio, which refused admittance. The only available opinion is that of the Ohio Court of Appeals, in *New Amsterdam Casualty Co.* v. *Wirtz Transfer Co.*, 5 Ohio Opns. 80, 20 O. L. Abs. 309 (1935). The Ohio court held that since the work contract required the contractor to furnish all labor and material at his own cost and expense, the Ohio law gave a right of recovery under the bond to the laborers and materialmen. The only proviso of the bond with which that court was concerned was the sixth, which sought to limit any right of recovery under the bond to the obligee named therein, The Miami Conservancy District. This proviso was declared to be void as contrary to the public policy of the State of Ohio and to be ineffective to bar the claims of laborers and materialmen against the Surety. Final judgment being entered against the Petitioner Surety Company, it was paid. It sought reimbursement from the Conservancy District. Liability was disclaimed and this suit seasonably brought for the amount which the Surety had paid in satisfaction of the Ohio judgment.

Having admitted by the Agreed Statement of Facts that the final payment was made to the contractor at the time required by the work contract, the Surety Company, to sustain its position in this action, is forced to show that the terms of the work contract were in some way changed and that change was binding on all parties. Its first cause of action is based on the contention that such a change was effected by the fourth incidental proviso, contending that the phrase of the bond quoted above (lines 24-26),

defining a condition as clearly as words can express that concept, actually created a promissory obligation. That purported result is based on the ground that otherwise this clause has no meaning. Liability is then claimed on a breach of a definite promise. Respondent has insistently submitted that the provisos are completely effective as to it in the form of conditions in accordance with their terms. The first five provisos effectively prevented any recovery by the named Obligee unless it was shown that they were strictly complied with. On its face, the sixth proviso prevented action against the Surety by anyone else. But that proviso was held to be contrary to the public policy of the State and void. The Surety simply did not advert to the fact that under the Ohio law its bond obligated it to others than the named obligee and it did not insert in its bond effective provisions for its protection under the circumstances which arose, assuming the District would have agreed to such provisions. The provisos having effective meaning as conditions, this situation supplies no reason for giving them a contrary effect. Furthermore, even though the bond did purport to impose promissory obligations on the Obligee, they were not effective to constitute an alteration of the work contract because they were not executed in compliance with the provisions of General Code, Section 6828-16, *supra*.

As a second cause of action, the Surety Company in this case claimed a right in equity, on the basis that the withheld twenty per cent of the preliminary payments became a trust fund for its protection, and that the final payment above mentioned constituted a breach of trust for which it is entitled to a recovery (R. 5). Respondent's fundamental answer has been that the final payment having been made in accordance with the contract pro-

visions, any equitable claim was cut off. It has also insisted that there was no equitable right created under the facts at issue.

Thus the sole primary issue of the case is whether the provisos of the bond constitute conditions precedent to liability of the Surety thereon or are promissory obligations of the obligee. This is simply a question of the interpretation of the written agreements of the parties, under the common rules of construction.

A.

Decisions of Lower Courts.

The District Court found in favor of the Surety Company. The decision (R. 54) consists principally of a repetition of the Agreed Statement of Facts as the Court's finding of fact, and excerpts from the decision of the Ohio Court of Appeals. In construing the contract, the decision uses the determination of the Ohio Court as its basis and reaches the conclusion that (R. 66) "the so-called 'conditions' became and were obligations of defendant herein to plaintiff herein." Respondent respectfully submits that this conclusion is a complete *non sequitur*. In considering the equitable cause of action, the District Court also found that the amount which the contract provided was to be retained by the Conservancy District became a trust fund; that this amount having been paid to the contractor before he was entitled to be paid constituted a breach of trust for which the Surety was entitled to recover. Our fundamental disagreement with this decision is that the terms of the work contract are the only effective promises made by the District, and so the payment made within thirty days after the acceptance of the work was a proper payment. We do not understand that

any "trust fund" was created, but the determination of that question is not essential to the decision.

The next to the last paragraph (R. 67) of the District Court's opinion apparently is based upon a misreading of a sentence (bottom, R. 35) of the contract. This error is corrected by the Circuit Court of Appeals (R. 83).

On appeal, the Circuit Court of Appeals reversed the District Court and ordered it to dismiss the action (R. 83 and 95). After reciting the facts, the opinion of this court reduced the case to its elemental issue. Upon construing the documents to determine whether the provisos were conditions or promises, it found that the contract (R. 81) "obligated the District to pay for the work on or before thirty days after its acceptance * * *"; that it was permissible for the District to hold the money for a further period, but if payment was made at once, "it may not, we think, be challenged" (R. 81). Had the provisos been held to be legally effective promises, the respondent would unquestionably have been required to withhold payment until the end of the thirty-day period at least. The Court finds no such obligation.

By using negative expressions, the Court expressly rejected the Surety's contention that the provisos constitute promissory obligations of the Conservancy District. In speaking of the fourth proviso, it is said (R. 81, bottom):

> "Were we to view it as a promissory obligation of the District it would require consideration of Section 8324 of the Ohio G. C., * * * Whether the notice permitted under Section 8324 or the requirement of Section 8325 authorize a lien to be acquired by a subcontractor, materialman, or laborer on a public improvement, we have no need to decide."

Following the last quoted statements comes the discussion of General Code Section 8324 and the case of *Village of Beachwood* v. *Ohio Casualty Co.*, 47 Ohio App. 212 (1934). This introduction to that discussion clearly earmarks the following comments as *obiter dicta* to the reasoning essential for the decision. The Court expressly states that it has no need to decide whether or not the Code Sections authorize a lien (R. 82).

The second issue presented by the Second Amended Petition filed in the District Court, claiming a right of recovery under a trust theory, is met squarely by the determination of the Circuit Court of Appeals that the final payment to the contractor was made in accordance with the contract provisions. It being admitted that this payment was made in good faith and with no knowledge of unpaid claims, any possible equitable claim was extinguished and the Court finds no basis for any contention of breach of trust (R. 83).

In its consideration of these two issues, the Circuit Court of Appeals amply and ably disposes of the only dispute necessary to the determination of this case. Naturally, in so deciding the case, the Court did not follow opposing counsel and found it unnecessary to decide issues which they are insisting are involved in the case. The determination by the lower court obviates their consideration, and disposes of much of the contention made in the opposing brief. It is too well established to require citation of authority, that this Court will not consider legal questions which it finds are unnecessary to the determination of the issues presented by the pleadings and facts in the particular case before it. Possible error in the pronouncement of *obiter dicta* below is not persuasive in ap-

pealing to the discretion of this Court for the issue of a writ of certiorari.

We have thus gone into the facts to indicate that this litigation revolves solely about the construction of the terms of a specific contract and was correctly decided below. We deny that the terms of this bond are in any sense universal. It is submitted that the determination of these issues by this court will establish no legal concept or useful precedent in the decision of any other disputes. It is no matter of general interest, but is dependent upon its peculiar facts and circumstances.

IV.

REASONS GIVEN FOR GRANTING PETITION ARE INAPPLICABLE.

(Reply to Petitioner's Brief.)

It is Respondent's contention that the facts heretofore outlined determine that it is unnecessary and undersirable to grant this petition. However, for such help as it may be to this Court, Respondent desires to indicate also that the reasons given by Petitioner for granting the petition (petition, page 7) are not well-founded. We use the same outline as the opposing brief.

A. There is no conflict between decision below and decisions of other circuits.

There is no conflict between the decision below and the cases cited by petitioner, on page 9 of its brief, because the facts in each of those cases contained essential elements which are lacking in the present record.

The quotation from *Globe Indemnity Co.* v. *Unity Railways Co.*, 272 Fed. 607 (1921, C. C. A. 3), was mere

dicta and not necessary to the decision because the Surety there had consented to the payments made to the contractor (page 610) and the payments were held not to affect recovery.

In *Ft. Worth Independent School District* v. *Aetna C. & S. Co.*, 48 F. 2d 1 (1931, C. C. A. 5), and *National Surety Co.* v. *County Board of Education*, 15 F. 2d 993 (1926 C. C. A. 4), the payments were admittedly made by the public body to the contractor before they were due, and on this fact the court based its decision allowing a recovery by the Surety. These decisions cannot conflict with that in the principal case where the payment was properly made.

In *Claiborne Parish School Board* v. *Fidelity & Deposit Co.*, 40 F. 2d 577 (1930, C. C. A. 5), the decision was based on the fact that the school board made the final payment to the contractor with the knowledge that there were unpaid claims which the Surety would have to pay and for which it would look to the retained percentage for reimbursement. In the case at issue, it is admitted that there was no such knowledge (R. 19 and 83).

B. Further consideration of this litigation is important only to the parties.

We respectfully but emphatically deny that the questions which are actually involved in the determination of the issues of this case, and which were found to be involved by both of the lower courts, are of any general or widespread interest. As previously pointed out, this case is dependent upon its peculiar facts. None of the questions discussed under subdivisions 2, 3 and 4, *infra*, needs be determined until or unless this court finds the Circuit

Court of Appeals in error in holding the provisos to be conditions only.

In all of the search that counsel for both parties have made, only one case has been called to attention in which it was attempted to construe the incidental provisos of the bond as imposing promissory obligations on the obligee, which affected the terms of the contract which it was given to secure. That decision (*Milske* v. *Steiner Mantel Company*, 103 Md. 235, 247 (1906)) firmly rejected such a contention, saying:

> "The bond was given, not to vary, or change in any particular the obligations of the plaintiff under the contract, but to secure the faithful performance by him of all the duties assumed by him thereunder. Its object was to protect the defendant from loss, or damage which might result from non-performance by the plaintiff, and cannot be construed to add to, or change any of the terms of the contract, or be taken as a part thereof."

This lack of previous litigation of similar cases indicates one of two things: (1) That the proposition put forward by the Surety is so exceptional and without merit that it is seldom one has the temerity to present it; (2) That situations which might give rise to litigation similar to the issues here raised arise so infrequently that a determination of the issues cannot be said to be sufficiently important to appeal to the discretion of this court.

1. PETITIONER'S POSITION IS CONTRARY TO THAT IT MUST TAKE ON MERITS.

The statement of opposing counsel that this bond "was a common form used throughout the United States" has no support whatsoever in the record of this case, and our understanding is diametrically opposed to the

statement made. The words used to express the legal significance of the fourth proviso of the bond, which is at issue here, as clearly connotate a condition at law as words can express that concept. The lack of any uncertainty as to the meaning of this phrase and the particular facts involved distinguish the case at issue from those cited in opposing brief (pages 10, 11), and indicate the unique character of this litigation and the issues raised.

Granting this bond to be based on a uniform form, the decision of this case will constitute no useful precedent. Opponent's theory of the merits of the case is, as stated on page 6 of its brief in the Circuit Court of Appeals: "This is obviously not a case of interpreting simply a printed bond submitted by a surety to an obligee, but it is a proposition of interpreting jointly a printed bond and a work contract form supplied by the obligee." Since the work contract is obviously unique to this particular case, the Surety's contention that a decision by this court will settle important questions of wide application is absolutely inconsistent with the position it must take on the merits of the case.

2. Merging Bond and Contract Does Not Convert Conditions into Promises.

Full discussion of the argument made under petitioner's point II-B would require a consideration of the merits of the case. It seems sufficient for the present to point out that there is nothing related in this argument which indicates any justifiable reason why the words of the bond which clearly designate a condition should be construed as creating a promissory obligation. Granted, for the moment, that the bond and contract constituted one obligation, the portion of that obligation consisting

of the six provisos of the bond was clearly identified as conditions to the Surety's liability only, and even though some of the obligations of the Conservancy District ran directly to the Surety there was nothing in that circumstance that would convert these conditions into promises.

3. District Liable Only on Contracts Complying with Statutory Formalities.

Furthermore, even though it is assumed that a contract was created, obligating the Conservancy District to perform the six provisos of the bond, such a contract was not effective to bind the District under the Ohio law. We submit that opposing counsel are not justified in representing that Questions B and C, on page 2 of the petition, are involved in this case. Petitioner qualifies these questions by the clause—"in the absence of a restrictive statute." The exercise of the powers of the Conservancy District are restricted by Section 6828-16 (*supra*), which provides that a work contract must be "approved by the Board of Directors and signed by the president of the Board and by the contractor, and shall be executed in duplicate." This contract was for the work of the District. All of the terms of the agreement would have to be executed in conformity with this statutory provision. The record shows that the provisos were not approved by the Board of Directors and certainly were not executed by the president (R. 16). The bond was not in existence when the contract was executed. Had the Board of Directors approved an agreement embodying promises to the same effect as the provisos of the bond, and it was executed in accordance with the statutory requirement, we have no question but that it would bind the District. But if such an agreement had been so made, the District

would have been advised of its obligation, would have complied with it, and this dispute would not have arisen. Not having followed the provisions of the statute, the Ohio law is clear that such a purported agreement would be void and could not form the basis of a contract claim or one based on quasi contract or implied contract. This is the holding of *Village of Beachwood* v. *Ohio Casualty Company*, 47 Ohio App. 212 (1934). This decision was not sporadic but is based on repeatedly announced principles by the Supreme Court of Ohio.*

4. All Possible Lien Rights Expired with Final Payment to Contractor.

The petition for a writ of certiorari quotes from Section 8324 of the Ohio General Code, but does not quote the following Section, 8325, which gives the effect of the section quoted. It reads as follows:

> "Upon receiving the notice required by the next preceding section, such owner, board or officer or public authority or authorized clerk, agent or attorney thereof, *shall detain in his hands all subsequent payments* from the principal or subcontractor to secure such claims and the claims and estimates of other subcontractors, materialmen, laborers, mechanics, or persons furnishing materials to or performing labor for any contractor or subcontractor who intervenes before the next subsequent payment under the contract, or within ten days thereafter." (Italics supplied)

It is thus apparent that the only section of the Ohio Code which would permit laborers and materialmen to

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*McCloud v. Columbus, 54 O. S. 439 (1896); Welston v. Morgan, 65 O. S. 219 (1901); Buchanan Bridge Company v. Campbell et al., 60 O. S. 406 (1899); Frisbie Co. v. East Cleveland, 98 O. S. 266 (1918); Hommel & Co. v. Woodsfield, 115 O. S. 675 (1927).

have any lien against conservancy districts, or any of their property, applies only to payments unpaid to the principal contractor and in the hands of the public body at the time it is served with notice of the claim. There is no requirement that any part of the contract price should be withheld for four months. It is to be paid as provided in the contract, and when so paid the lien right is automatically extinguished for there is nothing to which the lien may attach. It is admitted in this case that the Miami Conservancy District not only received no such notice but, at the time it made the final payment to the contractor, had no knowledge of any unpaid labor or material claim. The time for effectively filing such liens expired with the final payment of the contractor by the District. There was no lien claim to which the Surety might be subrogated. The holding of *Village of Beachwood* v. *Casualty Co., supra,* to this effect is obviously correct. In this connection, we respectfully object to the inference created by opponent's quotation from *Hochevar* v. *Maryland Casualty Company*, 114 F. 2d 948 (1940, C. C. A. 6) (opposing brief, page 16), since they omit the preceding clause of the same sentence of the Hochevar opinion reading "* * * because of the dissimilar facts involved, no importance," etc. (page 951). The Circuit Court of Appeals did not criticize the Beachwood case, but clearly distinguished it from the case they were then deciding (See our next section).

C. The lower court has properly applied the law in all cases herein considered.

We respectfully, but emphatically, deny the statement of opposing counsel (their brief, page 19) that the Circuit Court of Appeals in its decision of *Hochevar* v.

Maryland Casualty Company (*supra*) repudiated the Ohio law as pronounced in *Village of Beachwood* v. *Ohio Casualty Co.* (*supra*). In the Hochevar opinion the Court distinctly states that "The decision of the Ohio Court of Appeals in *Village of Beachwood* v. *Ohio Casualty Insurance Co.*, 47 Ohio App. 212, 191 N. E. 797, is not applicable, inasmuch as the Village was not obligated by the contract, as was the county here, to retain the percentages until the materialmen and laborers were paid * * *" (page 951).

We have indicated that on the facts there involved, the Beachwood decision was sound. Also, as the Circuit Court of Appeals' opinions indicate, the Hochevar case and that at bar have no relation to each other because of vital differences in the facts out of which the two cases arose. In the first place, in the Hochevar case the county had notice of the outstanding claims of laborers and materialmen at the time they made the final payment. The Miami Conservancy District admittedly had no such notice (R. 19). In the second place, under the Hochevar case the county paid the contractor before he was entitled to the money under the contract terms, whereas the Miami Conservancy District was required to pay the contractor "on or before the expiration of 30 days after date of the acceptance of the work by the Board" (R. 35), and payment was not made until after that date (R. 19).

V.

CONCLUSION.

In submitting that there are no "special and important reasons" for granting a writ of certiorari in this case, we rely principally on the fact that the issues involved

must be determined on the basis of facts which are peculiar to this particular litigation. This position is set forth under Point III of our Index, Statement of Facts. This case does not fall within any of the classes indicated by Rule 38, Section 5, of the Rules of this Court.

We do not believe that it is necessary for the Court to go further in its consideration of the petition for a writ of certiorari, but incidentally it is submitted that we have clearly indicated that the decision reached by the Circuit Court of Appeals was eminently just and correct and that the reasoning of the opposing brief is not persuasive.

Respectfully submitted,

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FILED
AUG 18 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

PETITIONER'S REPLY BRIEF

Supporting Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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INDEX

Petitioner's Reply Brief Supporting Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit 1

The Decision Below 7

Conclusion 8

Table of Cases

Claiborne Parish School Board vs. Fidelity & Deposit Co., 40 F. 2d 577 (1930, C. C. A. 5) 6

Ft. Worth Independent School Dist. vs. Aetna C. & S. Co., 48 F. 2d 1 (1931, C. C. A. 5) 6

Hochevar vs. Maryland Casualty Co., 114 F. 2d 943 8

In re Schilling, 251 Fed. 966 8

Milske vs. Steiner Mantel Co., 103 Md. 234 7

National Surety Co. vs. County Board of Education, 15 F. 2d 993 (1926, C. C. A. 4) 6

Park et al. vs. Brunswick, 235 Mich. 210 (1926) 7

Statute

Ohio General Code, Section 6828-16 4

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The second sentence on page 2 of respondent's brief declares: "There is no debatable question of *law* involved." The second paragraph of the decision of the court of appeals below begins with the statement: "There is no *factual* controversy."

We submit that both the brief and the decision then proceed to ignore most obvious facts and establish legal precedents in a manner that leaves one almost dizzy in a maze of misstatements, half-truths, and *non sequiturs.*

We feel that the most clarifying approach is to quote a few of these misstatements in bold-faced type and follow with a correction as disclosed by the admitted facts.

On page 3 of respondent's brief we find:

"Questions B, C, and D Are Not Involved."

Question B, which involves the effect of incorporating the bond in the principal contract, was definitely referred to in the decision of the trial court (R. pp. 59 and 62), and is basic in plaintiff's first cause of action.

When the court of appeals declared (R. p. 81): "The contract was * * * not between the district and the surety" by necessity, if not by direct reference, it must have overruled the trial judge on this point.

Questions C and D are essential premises to plaintiff's second cause of action. The court of appeals disposed of C with the statement (R. p. 83), "It is doubtful that a public body whose contractual powers are limited, may be made liable as to private parties in relations *quasi ex contractu.*"

Question D was answered by the court of appeals with the statement (R. p. 83):

> "The rights of a surety in such circumstances can rise no higher than the rights of materialmen and in as much as no steps were taken to perfect any lien against the public authority, or against the retained percentages of the contract price before it was paid out, it follows that the surety may not recover."

If questions "B, C, and D are not involved," then four judges in the two lower courts have reasoned in vain.

Respondent's brief, bottom p. 5, says:

"This Claim (for Overdepth Deductions) **Is Not Included in the Second Amended Petition in the District Court, and Was Ignored by Both Lower Opinions."**

It was omitted from the petition because the fact was unknown to plaintiff when the petition was filed. However, it was included in the agreed statement of facts and was expressly commented upon by the trial judge (R. 55. True, the court of appeals did ignore these erroneous payments in the same way that it ignored all other improper payments made by the obligee. We submit that this oversight by the court of appeals was largely responsible for its erroneous conclusion.

Respondent's brief (p. 6) says:

"Since the Final Payment, March 25, 1933, Was of Larger Amount Than the Total Claimed by Petitioner and Was Properly Made, Any Possible Incidental Errors Would Cause No Damage to It."

If the deductions had been made as required by the contract, the final payment would have been $27,443.57. This was more than enough to satisfy the bank and all materialmen, and if properly made, no loss would have occurred.

Respondent's brief (p. 6) says:

"It Is Petitioner's Contention That in Some Way the Fourth Proviso (of the Bond Conditions) * * * **Altered and Superseded the Provisions for Final Payment in the Work Contract."**

This is a most erroneous statement of plaintiff's contention. We have never averred that the fourth bond condition altered any provisions of the work contract.

The fourth bond provision merely stipulated that the obligee should enforce the contract as written, and specifically make all retentions which the work contract said the obligee was authorized to make. The work contract (R. 33) provides that the obligee might require satisfactory evidence that all material and labor bills are paid before paying the principal contractor. It also provides that the obligee might retain any amount deemed necessary until so satisfied. The obligee could, under the contract as written, without any alterations, have retained any percentage within the limits of good faith, until the period for lien notices was past.

The bond condition merely required that the obligee would retain ten per cent during that period. Certainly this provision makes no effort to alter the contract. It merely stipulates for the observation of the contract. If these retentions had been made as permitted by the contract, and required by the bond, there would have been no loss. The court of appeals below completely ignored the existence of the above contract provisions along with its many other oversights.

However, if respondent's brief is correct in its contention that the bond provisions to be effective must alter the work contract, their conclusion that such an alteration violates Ohio General Code, Section 6828-16, and that therefore certiorari should not be granted, does not follow, because:

1. There is nothing in Ohio General Code, Section 6828-16, which limits the power of the conservancy board of directors to put any proviso in the work contract which it deems advisable, provided the same contract is submitted to all bidders. In the case at bar it was provided in the work contract that whatever bond was subsequently accepted by the board should be included in the work contract. This same offer was made to all bidders, because the work contract was prepared long in advance of the bids, and a copy thereof given to each bidder,

and each bidder knew that the bond which he submitted would be included in the work contract.

Therefore, the provisions of the bond were as much a part of the work contract as any other provisions therein, and when offered by the contractor and accepted by the board, it became equally binding upon the obligee, the principal, and the surety.

2. If the obligations of the bond are completely thrown out, as demanded by the respondent, plaintiff's second cause of action, which was on all fours with the plaintiff's cause of action in the four cases cited on page 9 of ~~respondent~~ petitioner's original brief, still persists, and basic questions C and D, set out in respondent's brief, still remain unresolved.

Respondent's brief, on page 8, says:

> **"Having Admitted by the Agreed Statement of Facts That the Final Payment Was Made to the Contractor at the Time Required by the Work Contract, the Surety Company, to Sustain Its Position in This Action, Is Forced to Show That the Terms of the Work Contract Were in Some Way Changed, and That Change Was Binding on All Parties.**

Petitioner nowhere admits that the final payment was made at the time required by the work contract, nor do we contend that the terms of the work contract were changed. A third repetition of this same error is set out on page 9 in the last sentence of the first paragraph.

On page 11, respondent's brief says:

> **"The Next to the Last Paragraph** (R. 67) **of the District Court's Opinion Apparently Is Based upon a Misreading of a Sentence** (bottom, R. 35) **of the Contract. This Error Is Corrected by the Circuit Court of Appeals** (R. 83)."

If the paragraph of the district judge's decision, referred to above, is read in conjunction with the pre-

ceding paragraph, it becomes apparent that the district judge was interpreting the payment provisions in the work contract in the light of the contract provisions permitting a retention until releases were obtained (as hereinbefore quoted from R. p. 32). The trial court specifically refers to the fourth bond condition requiring all retentions to be made which the obligee was authorized to make. This alleged "error" was "corrected by the court of appeals" by ignoring all of the contract provisions printed on page 33 of the record, as well as all provisions in the bond.

On page 14 of their brief, opposing counsel seek to distinguish *Ft. Worth Independent School Dist.* v. *Aetna C. & S. Co.*, 48 F. 2d 1 (1931, C. C. A. 5), and *National Surety Co.* v. *County Board of Education*, 15 F. 2d 993 (1926, C. C. A. 4), because in those cases payments were admittedly made to the contractor before they were due. Whereas, opposing counsel say the payment in the case at bar was properly made.

The record herein discloses that the payment on December 8, 1932, was too large by $1,313.87; the payment on January 9, 1933, was too large by $7,612.11; the payment on February 2, 1933, was too large by $7,500; and the payment on March 23, 1933, should not have been made at all until releases were obtained, but when made was $7,500 too small.

Opposing counsel seek to distinguish *Claiborne Parish School Board* v. *Fidelity & Deposit Co.*, 40 F. 2d 577 (1930, C. C. A. 5), by saying that the obligee had notice of unpaid materialmen in that case, whereas they did not have notice in the case at bar. It is true that this distinction does exist, but the reason of the court in the Claiborne case clearly shows that the existence or nonexistence of notice of unpaid material claims at the time of final payment has no determining effect where the prior erroneous payments were of such a palpable nature as to be a probable cause of loss.

Opposing counsel cite *Milske* v. *Steiner Mantel Co.*, 103 Md. 234, which is a case where the bond was not statutory; where it attempted radically to change the work contract; and where the bond was not incorporated in the work contract. This case, in brief, lacks all three factors on which petitioner herein bases its first cause of action.

Opposing counsel say that there is nothing in the record to show that the bond involved herein was of general use throughout the country, and that therefore this case is not of general interest. Unfortunately, there was no occasion, prior to filing the petition for writ of certiorari, to inject this question in the record.

However, with very little search, we have found the identical bond form in litigation in the case of *Park et al.* v. *Brunswick*, 235 Mich. 210 (1926), in which the American Surety Company was using this bond.

The Decision Below.

In addition to the palpable oversights in the decision below, which we have indicated above, the decision has some very unusual characteristics which we feel should be brought to the attention of the court.

(R. p. 80:)

> *"It is further* (plaintiff's) *contention that the bond being statutory is incorporated in the contract, and that since the contract is incorporated in the bond by express reference, the two instruments must be read together."*

It is noted that the court below completely overlooked the additional contention that the bond was also *expressly* incorporated in the contract.

(R. p. 81:)

> *"It must be observed, however, that the contract was between the district and the construction company, and not between the district and the surety."*

The same statement could have been made concerning all of the cases cited on page 9 of petitioner's original brief, as well as in the case of *Hochevar* v. *Maryland Casualty Co.*, 114 F. 2d 943, decided by the Sixth Circuit itself, yet in each of these cases the surety recovered.

(R. p. 81:)

> *"Were we to view* (the fourth bond obligation) *as a promissory obligation of the district, it would require consideration of Sec.* 8324, *O. G. C."*

The court then proceeds to "consider" the Ohio Code section and seems to question its validity to create a lien. It bases its doubt on *In re Schilling*, 251 Fed. 966, which on page 971 very forcefully declares this statutory section *effective* in creating a lien. The court then leaves, suspended in the air and wholly undecided, both the nature of the bond provisions and the efficacy of the lien statute, while it proceeds to discuss a totally different proposition.

(R. p. 83:)

> *"It is DOUBTFUL that a public body whose contractual powers are limited, may be made liable as to private parties in relations quasi ex contractu."*

If so, why not resolve the "doubt" when the matter was directly before the court?

Conclusion.

The circuit court of appeals below based its decision primarily on three propositions; that the obligee had not signed the bond and was therefore not a party to it; that the obligee had finally paid the principal in full, without actual notice of outstanding claims; and that a governmental unit cannot be held to the accepted obligee liabilities in suretyship law, because such liabilities arise *quasi ex contractu.*

The decision ignored all admitted violations of the provisions of the bond, without deciding as to whether these provisions were conditions or promises. It failed even to mention the admitted violation of all contract provisions for installment payments and overdepth deductions. It refuses to mention or consider the express incorporation of the bond into the principal contract.

In short, all considerations which the trial court, as well as many other federal circuit courts have held to be determinative, the appellate court below ignored. This it did in what we submit was an unfortunate attempt to follow an Ohio State Court decision, involving easily distinguishable facts, expounding of *obiter dicta;* conflicting with decisions of higher state courts; and rendered after the rights of the parties herein had fully accrued.

If such is to be our future law of suretyship, we finally submit it ought to be set forth in clear, understandable reasoning by a court of final jurisdiction.

Respectfully submitted,

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